

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NINA KRISTIANSEN,

Plaintiff,

vs.

MICHAEL J. ASTRUE,
Commissioner of Social Security,
Defendant.

Civ. No. 07-CV-0233-TC

FINDINGS AND RECOMMENDATION

Coffin, Magistrate Judge:

Plaintiff, Nina Kristiansen, seeks review of a final decision of the Commissioner denying her application for Social Security disability and Supplemental Security Income disability benefits. Before the court is plaintiff's complaint (#2). For the reasons that follow, the decision of the Commissioner should be reversed and the matter remanded for further proceedings.

Background

Plaintiff alleges disability beginning December 31, 2002, based on combined impairments including multiple chemical

1 sensitivities and borderline intellectual functioning. Her
2 applications for disability and social security income payments
3 were denied initially and upon reconsideration. Tr. 41, 550,
4 558. At an initial hearing, the ALJ determined additional
5 medical testing was necessary. Tr. 591-603. After a second
6 hearing, the ALJ issued a decision finding plaintiff not
7 disabled. Tr. 14-32. The record before the ALJ contained, among
8 other evidence, lay witness testimony by plaintiff's father,
9 medical source testimony from a number of physicians, and
10 plaintiff's subjective reports. Particular parts of the record
11 will be discussed below in the context of analyzing plaintiff's
12 claims before this court.

13 At step one of the five-step sequential evaluation process,
14 20 C.F.R. §§ 404.1520, 416.920, the ALJ found that plaintiff had
15 not engaged in substantial gainful activity since her alleged
16 disability onset date. Tr. 18, 31. At step two, the ALJ found
17 that plaintiff had one severe impairment, a history of multiple
18 chemical sensitivities. Tr. 22. At step three, the ALJ found
19 that plaintiff's impairments did not meet or equal the
20 requirements of a listed impairment. Tr. 31. The ALJ determined
21 that plaintiff had the residual functional capacity to perform
22 medium exertion work, but must avoid driving and cleaning work
23 due to the multiple chemical sensitivities condition. Tr. 23.
24 At step four, the ALJ found that plaintiff was able to perform
25 her past relevant work as a medical records clerk, laboratory
26 assistant, coffee maker, waitress, clerical worker, and
27 bookkeeper, but not as a driver or housecleaner. Tr. 30-31. On
28 this basis, the ALJ concluded that plaintiff was not disabled at

1 any time since her alleged onset date. Tr. 31. The Appeals
2 Council denied her request for review. Tr. 8.

3 Plaintiff brought this action pursuant to 42 U.S.C. §§
4 405(g), 1383(c)(3) seeking judicial review of the final decision
5 of the Commissioner of Social Security denying her applications
6 for disability insurance benefits and supplemental security
7 income disability benefits. In plaintiff's view, the ALJ erred
8 in a number of respects and arrived at conclusions that lack
9 substantial evidence and are contrary to law. Plaintiff disputes
10 the ALJ's findings at steps two, three, and four. In particular,
11 plaintiff asserts that the ALJ erred in finding plaintiff's
12 mental impairments not severe, rejecting plaintiff's testimony
13 regarding her limitations, rejecting lay evidence, rejecting
14 medical source opinions, and in posing an improper vocational
15 hypothetical to the vocational expert. As explained below, the
16 decision of the Commissioner should be reversed and the case
17 remanded for further proceedings.

18 Discussion

19 Plaintiff's mental impairments

20
21 Plaintiff contends that the ALJ erred in not following
22 agency regulations for evaluating mental impairments. The record
23 supports plaintiff's argument. In July 2004, clinical
24 psychologist Daryl Birney performed a consultative neuro-
25 psychological examination and personality assessment. Tr. 400-
26 23. Plaintiff underwent a number of diagnostic tests (Wechsler
27 intelligence and memory scales (WAIS-III), Trailmaking A & B,
28

1 Aphasia Screening, and Minnesota Multiphasic Personality
2 Inventory-2 (MMPI), and background and mental status interviews.
3 Based on those results, and on a review of prior medical records,
4 Birney diagnosed plaintiff with undifferentiated somataform
5 disorder; depressive disorder NOS, and borderline intellectual
6 functioning, and assigned a Global Assessment Functioning score
7 of 50. Tr. 400-03. Birney also found that plaintiff had
8 moderate limitations in the ability to understand and remember
9 detailed instructions; carry out detailed instructions; make
10 judgements on simple work-related decisions; interact
11 appropriately with the public, supervisors, and co-workers;
12 respond appropriately to work pressures in a usual work setting;
13 and respond appropriately to changes in a routine work setting.
14 Tr. 422-23.

15 The ALJ determined that plaintiff did not have any medically
16 determinable severe mental impairments. Tr. 22-23. The ALJ
17 explained that "claimant has not had any mental health
18 treatment," and surmised that her GAF score was attributable to
19 her multiple chemical sensitivities. Tr. 22. He added that
20 Birney noted that plaintiff's MMPI profile was "of questionable
21 validity," and might have affected findings on the WAIS-III. He
22 noted that plaintiff completed the GED and was capable of semi-
23 skilled work in the past, and that she used alcohol as a
24 diuretic. Tr. 22-23.

25 The ALJ failed to follow steps required under 20 C.F.R. §
26 404.1520a for evaluating whether a claimant suffers from a mental
27 impairment, a prerequisite to the question whether a mental
28 impairment is "severe." See 20 C.F.R. §§ 404.1520a ("when we

1 evaluate the severity of mental impairments for adults . . . we
2 must follow a special technique at each level in the
3 administrative review process. We describe this special
4 technique in paragraphs (b) through (e) of this section."); 20
5 C.F.R. § 404.1520a(d) ("After we rate the degree of functional
6 limitation resulting from your impairment(s), we will determine
7 the severity of your mental impairment(s)"). Those steps
8 include evaluating whether any medically determinable mental
9 impairment exists, rating the degree of resulting functional
10 limitation, and recording findings. 20 C.F.R. § 404.1520a(b)-
11 (c).

12 The record before this court does not indicate that the ALJ
13 made any of the required demonstrations. Rather, the ALJ appears
14 to have prematurely addressed the question whether plaintiff
15 suffered from "severe" medically determinable mental impairments.
16 The ALJ's failure to comply with 20 C.F.R. § 404.1520a precludes
17 this court from engaging in meaningful review of the ALJ's step-
18 two determination, and remand on this basis is required.¹ See
19 Gutierrez v. Apfel, 199 F.3d 1048, 1050 (9th Cir. 2000)
20 (noncompliance with 20 C.F.R. § 404.1520a(d) constitutes
21 reversible error).

22
23 ¹In addition, the ALJ failed to include plaintiff's mental
24 limitations in the RFC findings and to consider her borderline
25 intellectual functioning. On remand, regardless of whether the ALJ
26 determines plaintiff's mental impairments to be severe, he must
27 include them in the RFC determination. 20 C.F.R. § 404.1523 ("In
28 determining whether your physical or mental impairment or impairments
are of a sufficient medical severity that such impairment or
impairments could be the basis of eligibility under the law, we will
consider the combined effect of all of your impairments without regard
to whether any such impairment, if considered separately, would be of
sufficient severity.").

1 2. Plaintiff's subjective complaints

2 Plaintiff further contends that the ALJ erred in rejecting
3 her subjective symptom testimony. In evaluating a claimant's
4 subjective symptom testimony, an ALJ first reviews the record for
5 objective medical evidence of an underlying impairment that could
6 reasonably be expected to produce some degree of symptom. Smolen
7 v. Chater, 80 F.3d 1273, 1281-82 (9th Cir. 1996). Where the
8 record lacks evidence of malingering, the ALJ may reject the
9 testimony on credibility grounds by giving clear and convincing
10 reasons supported by substantial evidence. Thomas v. Barnhart,
11 278 F.3d 947, 958-59 (9th Cir. 2002).

12 The ALJ rejected plaintiff's testimony for a number of
13 reasons that fall short of the clear and convincing standard.
14 First, the ALJ rejected her allegations based on asserted
15 contradictions between plaintiff's activities of daily living and
16 subjective complaints. The ALJ cited testimony from plaintiff's
17 mother indicating that plaintiff cared for herself, prepared her
18 own meals, kept house with chemical-free products, managed her
19 finances and e-mailed, and went out for shopping and
20 appointments. Tr. 24. In the ALJ's view, the performance of
21 these activities of daily life is inconsistent with plaintiff's
22 complaints of multiple chemical sensitivities and did not support
23 a conclusion of work related limitations other than driving or
24 cleaning. Id. I disagree.

25 Only where a level of activity is "inconsistent with [her]
26 claimed limitations would these activities have any bearing on
27 [c]laimant's credibility." Reddick v. Chater, 157 F.3d 715, 722
28 (9th Cir. 1998). Here, plaintiff asserts that when she is

1 exposed to chemicals in work settings and during public
2 activities, she suffers debilitating reactions. Plaintiff's
3 activities in the controlled home environment do not detract from
4 that assertion. Moreover, the fact that plaintiff must leave the
5 home to shop and keep appointments does not contradict her claim
6 that she suffers reactions when exposed to chemicals during those
7 errands. In short, the record does not support the ALJ's
8 determination that plaintiff's daily activities contravene her
9 subjective symptom testimony.
10

11 The ALJ also reasoned that plaintiff's credibility is
12 impaired because her symptoms "appear to be exaggerated, which
13 has been recognized by various physicians of record." Tr. 25.
14 The ALJ recited the list of reaction-triggering exposures that
15 plaintiff identified (including smog, housecleaning products,
16 petroleum fumes, air fresheners, and pesticides). Tr. 25. It is
17 unclear, however, why the ALJ deems plaintiff's reports of
18 reaction-triggering agents to be exaggerated. The ALJ stated
19 that "various physicians of record" indicate that plaintiff
20 exaggerated her symptoms. However, only one physician, Dr.
21 Treyve, indicated that plaintiff's symptoms "sound exaggerated,"
22 in an evaluation that credited her complaints and indicated the
23 need for further examination. His report stated:

24 [T]his lady I think has a really difficult problem.
25 She very likely has some underlying inhalant allergies
26 such as dust mite allergy, which might be associated
27 with these intolerances, which seemed to be that of
28 hydrocarbon intolerances in her environment. Some of
her symptoms sound exaggerated and some sound totally
plausible. I suspect she may have underlying
autoimmune disease and very likely fibromyalgia.

7 Findings and Recommendation

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2 Tr. 307.

3 In context, the physician's report did not reject
4 plaintiff's complaints; rather, he described, albeit in
5 equivocating terms, how her report seemed, and how certain
6 conditions might reasonably explain her complaints. The
7 physician made no distinction between which symptoms "sound
8 totally plausible" and which "sound exaggerated," and therefore
9 provided no basis for the ALJ to dismiss the entirety of
10 plaintiff's claims as "exaggerated." Seizing upon the bare term
11 "exaggerated" in this physician's report alone does not
12 substantiate the ALJ's conclusory statement that plaintiff's
13 reports that certain agents trigger reactions "seem exaggerated,"
14 when no other basis is provided,² and when plaintiff's reports are
15 substantiated by lay witnesses and physicians of record.

16 The ALJ noted that "no objective evidence" supported
17 plaintiff's allegations that she had to leave a previous medical
18 job due to chemical exposure in the workplace. However, her
19 report is essentially corroborated by a physician who worked at
20 the same office: "she came to work at our facility but began to
21 have allergic reactions in the workplace to the point where she
22 had to leave work, she could not even finish the two weeks notice
23 that she gave. She really enjoyed working here. She was very
24 popular here and it was a very unfortunate situation." Tr. 353.

25
26 ²The ALJ also cited the report of Steven VanderWaal that he was
27 somewhat skeptical of the diagnosis of multiple chemical
28 sensitivities, Tr. 399. This report does not impugn plaintiff's
credibility; rather, it states disagreement with an available medical
conclusion. Further, it corroborates plaintiff's complaints of
reactions to volatile chemicals or fumes. Id.

1
2 The ALJ also questioned plaintiff's credibility based on her
3 cigarette and alcohol use. He noted that plaintiff indicated
4 that cigarette smoking aggravated the problem. He further noted
5 that plaintiff had attempted to use alcohol as a diuretic in
6 order to self-treat the swelling that resulted from chemical
7 exposures, but she ceased doing so after an alcohol-related
8 accident. Tr. 26. The ALJ rejected plaintiff's credibility
9 because her practice of smoking was inconsistent with her
10 subjective symptom testimony, and her "alcohol consumption
11 contradict[s] her claim of multiple chemical sensitivities." Tr.
12 26-27. I do not find this reasoning clear and convincing.
13 Plaintiff ceased smoking after noting that cigarette use worsened
14 her problem; thus, her former cigarette use supports her
15 complaints. Further, the ALJ did not explain how plaintiff's
16 alcohol use is inconsistent with her subjective complaints. The
17 Commissioner points to no basis in the record to support the
18 assumption that, if plaintiff is sensitive to certain chemicals,
19 she should also react to chemicals in alcohol, and her alcohol
20 use would therefore contradict her complaints. In sum, these
21 bases for rejecting plaintiff's credibility are not clear and
22 convincing.

23 Finally, the ALJ discounted plaintiff's credibility on the
24 basis that plaintiff failed to pursue certain treatments and made
25 baseless pain complaints. Tr. 25. Plaintiff's asserted failure
26 to pursue treatment includes one instance in which plaintiff
27 discontinued using a prescribed diuretic, and another instance
28 in which she was referred to vascular surgery but did not follow

1 through. Tr. 26. The record indicates that "OHSU would not see
2 her in their vascular surgery clinic." Tr. 353. The ALJ did not
3 account for this evidence before concluding that plaintiff did
4 not follow through, and for that reason, substantial evidence is
5 lacking for the credibility conclusion founded on her failure to
6 report for vascular surgery.
7

8 The record does, however, indicate that plaintiff
9 discontinued a prescribed diuretic, but does not indicate why.
10 Tr. 353. The record also supports the ALJ's determination that
11 plaintiff's inguinal pain was not supported by significant
12 clinical findings. Tr. 24. Upon remand, the ALJ may consider
13 the weight and import of these matters in arriving at a
14 determination concerning plaintiff's credibility that does not
15 include the above inadequately substantiated conclusions.
16

17 3. Lay witness testimony

18 The record contains lay witness testimony from plaintiff's
19 father, Nils Kristiansen. He reported that plaintiff experienced
20 swelling and breathing problems after attempting to stay at his
21 house, lacked the energy to get out of bed, had to avoid bleach,
22 chemical cleaners, and petroleum products when trying to clean
23 house. He explained that she cannot hold a job, noting, "[i]t is
24 not what she does but where," adding, "[m]ost places have issues
25 she can't deal with environmentally. It has curtailed her social
26 life." Tr. 204-05. He reported that her conditions affect her
27 concentration and her dealings with others. Tr. 205.
28 Kristiansen further explained,

1
2 I realize that my daughter's chemical sensitivity
3 disorder does not fit neatly into your standard
4 categories for disability. Her condition is however
5 debilitating.

6 I remember her getting occa[s]ional migraine
7 headaches more than two years ago. The last two years
8 it takes less and less to affect her to where she
9 can't function. It takes longer bouts of fresh air to
10 get her back to normal. She stayed with us over
11 Christmas till Jan. 14th. She had problems with the
12 air in our home. She would spend her days walking
13 outside and trying to avoid traffic but that is not
14 easy here. She seemed to have no energy in the
15 morning and spent most of her time in the house in
16 bed.

17 Tr. 207.

18 In a letter to the ALJ, Kristiansen wrote:

19 Her condition has been worsening over the last few
20 years, and it has reached the point where she is
21 effectively disabled. She is unable to live in a
22 regular house because of carpeting, glue chemicals in
23 laminates, etc., etc. She has tried to live with us
24 here in Bend, but our home contains the same chemical
25 pollutants as almost all other homes, plus we live on
26 a fairly trafficked downtown street. We have
27 experimented with having her live with friends away
28 from the downtown area, but she could not avoid
coming into town for shopping, etc., and still was
unable to work at a business. Car exhaust fumes are
another major problem. Her symptoms include
headaches, swelling of the face and limbs, chest pain
and deep muscle fatigue. Her symptoms last for
several days after a chemical exposure.

Tr. 238.

The ALJ did not address Mr. Kristiansen's testimony. The
Commissioner contends that the ALJ considered the statements but
"did not specifically discuss" them. Def. Memo. at 14. The
Commissioner does not indicate any point in the ALJ's opinion
that evidences that interpretation; rather he recites the ALJ's
contention that he reviewed statements by third party witnesses

1 prior to the ALJ's discussion of particular witness testimony
2 that did not include Nils Kristiansen. My review of the ALJ's
3 findings does not reveal any indication that the ALJ considered
4 Mr. Kristiansen's testimony in particular. "If the ALJ wishes to
5 discount the testimony of the lay witness, he must give reasons
6 that are germane to each witness." Dodrill v. Shalala, 12 F.3d
7 915, 919 (9th Cir. 1993). Here, no such reasons were given.
8

9 "[W]here the ALJ's error lies in a failure to properly
10 discuss competent lay testimony favorable to the claimant, a
11 reviewing court cannot consider the error harmless unless it can
12 confidently conclude that no reasonable ALJ, when fully crediting
13 the testimony, could have reached a different disability
14 determination." Stout v. Commissioner, 454 F.3d 1050, 1056-57
15 (9th Cir. 2006). In light of Mr. Kristiansen's testimony
16 concerning the extent of plaintiff's inability to function in a
17 number of common environments, I cannot confidently conclude that
18 no reasonable ALJ would have reached a different disability
19 determination.
20

21 4. Opinions of plaintiff's physicians

22 Lester v. Chater, 81 F.3d 821 (9th Cir. 1995), sets the
23 standard for weighing physicians' opinions, and the bases on
24 which they may be rejected. It explains:
25

26 Cases in this circuit distinguish among the opinions
27 of three types of physicians: (1) those who treat the
28 claimant (treating physicians); (2) those who examine
but do not treat the claimant (examining physicians);
and (3) those who neither examine nor treat the

claimant (nonexamining physicians). As a general rule, more weight should be given to the opinion of a treating source than to the opinion of doctors who do not treat the claimant. Winans v. Bowen, 853 F.2d 643, 647 (9th Cir. 1987). At least where the treating doctor's opinion is not contradicted by another doctor, it may be rejected only for "clear and convincing" reasons. Baxter v. Sullivan, 923 F.2d 1391, 1396 (9th Cir. 1991). We have also held that "clear and convincing" reasons are required to reject the treating doctor's ultimate conclusions. Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988). Even if the treating doctor's opinion is contradicted by another doctor, the Commissioner may not reject this opinion without providing "specific and legitimate reasons" supported by substantial evidence in the record for so doing. Murray v. Heckler, 722 F.2d 499, 502 (9th Cir. 1983).

The opinion of an examining physician is, in turn, entitled to greater weight than the opinion of a nonexamining physician. Pitzer v. Sullivan, 908 F.2d 502, 506 (9th Cir. 1990); Gallant v. Heckler, 753 F.2d 1450 (9th Cir. 1984). As is the case with the opinion of a treating physician, the Commissioner must provide "clear and convincing" reasons for rejecting the uncontradicted opinion of an examining physician. Pitzer, 908 F.2d at 506. And like the opinion of a treating doctor, the opinion of an examining doctor, even if contradicted by another doctor, can only be rejected for specific and legitimate reasons that are supported by substantial evidence in the record. Andrews v. Shalala, 53 F.3d 1035, 1043 (9th Cir. 1995).

The opinion of a nonexamining physician cannot by itself constitute substantial evidence that justifies the rejection of the opinion of either an examining physician or a treating physician.

Lester, 81 F.3d at 830-31 (footnote omitted).

A. Dr. Birney

As discussed above, the ALJ failed to address Dr. Birney's opinions under the procedure set forth in 20 C.F.R. § 404.1520a. Upon remand, the ALJ will have the opportunity to do so.

13 Findings and Recommendation

1
2 B. Dr. Hatlestad

3 Dr. Hatlestad opined in part that plaintiff was unable to
4 maintain gainful employment as a result of her multiple chemical
5 sensitivities. Tr. 327. The ALJ rejected that testimony on the
6 grounds that Dr. Hatlestad "has not provided adequate support for
7 his opinions about the claimant's diagnosis and prognosis." The
8 ALJ added, "he has added that as a result of the claimant's
9 multiple chemical sensitivity, 'she has difficulty tolerating
10 most all work environments' (Exhibit 9F/54). However, he does
11 not specify which environments the claimant is unable to
12 tolerate." Tr. 28.

13 Neither reason is adequate. As explained in Smolen v.
14 Chater, 80 F.3d 1273, 1287-88 (9th Cir. 1996), an ALJ's duty to
15 develop the record prevents the ALJ from dismissing a medical
16 opinion because the authoring doctor failed to explain its basis:

17 In Social Security cases the ALJ has a special duty
18 to fully and fairly develop the record and to assure
19 that the claimant's interests are considered."
20 Brown v. Heckler, 713 F.2d 441, 443 (9th Cir. 1983).
21 This duty exists even when the claimant is
22 represented by counsel. Id. If the ALJ thought he
23 needed to know the basis of Dr. Hoeflich's opinions
24 in order to evaluate them, he had a duty to conduct
25 an appropriate inquiry, for example, by subpoenaing
26 the physicians or submitting further questions to
27 them. See 42 U.S.C. § 405(d)(1988); 20 C.F.R. §
28 404.950(d)(1991); 20 C.F.R. § 404.1527(c)(3). He
could also have continued the hearing to augment the
record. See 20 C.F.R. § 404.944 (1991). Having
failed to fully develop the record regarding the
basis for Dr. Hoeflich's opinions, the ALJ could not
then reject those opinions-which were uncontroverted
and corroborated-because they were given in response
to leading, hypothetical questions.

Here, the ALJ was free to use the channels at his disposal to
follow up on the issue of tolerable work environments, and the

1 basis for his diagnosis and prognosis. Further, the record
2 corroborates Dr. Hatlestad's conclusion that plaintiff's chemical
3 sensitivities preclude her from working in a number of
4 environments, and the ALJ himself concluded -- based on evidence
5 in the record -- that plaintiff indeed suffered from the
6 diagnosis that Dr. Hatlestad determined, multiple chemical
7 sensitivities. The ALJ erred in rejecting Dr. Hatlestad's
8 opinions.
9

10
11 C. Dr. Morgan

12 The ALJ summarized and then rejected the following opinion
13 of examining physician Dr. Morgan:

14 Dr. Morgan opined on June 1, 2004, that claimant was
15 not capable of any type of employment at present
16 time. She has definitely a physical illness, which
17 is seriously incapacitating. There is no evidence of
malingering, and this is not a psychophysiologic
problem. Any elements of depression or emotional
disturbance are deemed secondary to physical illness.

18 Tr. 28. The ALJ explained, "even if this physician does not
19 consider the claimant a malingerer, other evidence of record
20 notes inconsistencies, exaggerations or inadequate validity, as
21 stated hereinbefore." Id. Here, the ALJ has identified a
22 conflict in evidence, but he does not indicate which physician of
23 record, if any, provided conflicting evidence. Thus, the court
24 measures the ALJ's rationale under the clear and convincing
25 standard. I find no specific citation of inconsistency or
26 exaggeration that would allow an adequate review of the ALJ's
27 finding. To the extent that the ALJ based his reasoning on
28 erroneously considered credibility evidence described above,

1 reconsideration of this evidence on remand would be required.

2
3
4 D. Dr. VanderWaal

5 The ALJ characterized the opinion of Dr. VanderWaal, one of
6 plaintiff's examining doctors, in this way:

7 Dr. VanderWaal reported on July 1, 2004, there were no
8 objective findings on [plaintiff's] examination that
9 would physically keep her from working. However,
10 subjectively she has symptoms when exposed to
11 perfumes, chemicals or other toxins. This makes it
12 difficult for her to work with the public. From a
13 physical standpoint, it would be expected that she
could perform any job activity for which she is
qualified. There are no limitations on her ability
to sit, stand or walk. She can hear and speak without
difficulty, and she is also able to travel. Based on
her symptoms alone, she should avoid exposure to
volatile chemicals or fumes.

14 Tr. 29. He then rejected the opinion on the basis that "the
15 claimant has been smoking and drinking alcohol during the period
16 under consideration in this decision, which undermines her
17 complaints of chemical sensitivities." Id. As I explained
18 above, plaintiff ceased smoking after noting that cigarette use
19 worsened her problem; thus, her former cigarette use supports her
20 complaints. And, again, the ALJ did not explain how plaintiff's
21 alcohol use is inconsistent with her subjective complaints.
22 Absent any basis in the record to support the assumption that, if
23 plaintiff is sensitive to certain chemicals, she should also
24 react to chemicals in alcohol, there is no clear and convincing
25 basis to conclude that plaintiff's alcohol use would contradict
26 her complaints.

1
2 E. Dr. Mead

3 The ALJ summarized the opinion of Dr. Mead, a treating
4 physician:

5 Dr. Mead opined in November 2004 that claimant's
6 disease significantly interferes with her ability to
7 concentrate and remember in a work setting. She could
8 not tolerate even a minimal stress load in a work
9 setting. She requires to sleep at certain times
10 throughout the day. She would require many unscheduled
11 breaks and even frequent absenteeism from the work
12 place.

13 Tr. 29. Dr. Mead's opinion was based on the theory that
14 plaintiff's sensitivities were caused by mercury toxicity. Tr.
15 375-91. The ALJ rejected Dr. Mead's opinion on the basis that
16 Dr. Sudakin, a reviewing physician and specialist in medical
17 toxicology, criticized the testing method used by Dr. Mead and
18 had concluded that mercury intoxication was an unsupportable
19 diagnosis. Tr. 29. "The opinion of a nonexamining physician
20 cannot by itself constitute substantial evidence that justifies
21 the rejection of the opinion of . . . an examining physician[.]"
22 Lester, 81 F.3d at 831. Here, it is clear that the ALJ
23 identified a conflict between the opinions of an examining and
24 reviewing physician, but he cannot solely rely on the opinion of
25 Dr. Sudakin, a reviewing physician, in order to reject the
26 opinion of Dr. Mead, who examined plaintiff.

27 F. State agency physicians

28 The ALJ rejected the opinion of state agency physicians
because "[t]he diagnosis of multiple chemical sensitivities has
been questionable. Her complaints have been exaggerated and are

1 not supported by objective findings." Tr. 30. The ALJ's
2 reasoning is insufficient. As noted above, the ALJ determined
3 that the record supported his own conclusion that plaintiff
4 suffered from multiple chemical sensitivities. Further, the
5 record does not support the contention that plaintiff's
6 complaints are not supported by objective findings; for example,
7 physicians recorded edema, an observable aspect of plaintiff's
8 reaction to chemical exposure. See Tr. 346. The ALJ's stated
9 basis for rejecting the opinions of the agency physicians is
10 inadequate.
11

12 5. Vocational hypothetical

13 Plaintiff finally contends that the ALJ erred in failing to
14 pose a vocational hypothetical that included all of plaintiff's
15 limitations. The court agrees. The ALJ's hypothetical did not
16 include plaintiff's mental limitations. Tr. 660-61. On remand,
17 those limitations, and any others that may become evident upon
18 the ALJ's reconsideration of the evidence according to the
19 court's, must be included in a valid vocational hypothetical.
20 See Russell v. Sullivan, 930 F.2d 1443, 1445 (9th Cir. 1991)
21 (explaining rule).
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3 Conclusion
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5 In conclusion, the decision of the Commissioner should be
6 reversed and the case remanded for further proceedings consistent
7 with this opinion.
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10 Dated this 8th day of March, 2008.
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14 _____
15 THOMAS M. COFFIN
16 United States Magistrate Judge
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